IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.35 OF 2004
IN
SUMMARY SUIT NO.510 OF 1999

Nareshkumar Chandrakant Shah as
Karta and Manager of his HUF
Nareshkumar Chandrakant Shah HUF Plaintiff

versus

Deepak M. Shah Defendant

Ms.Yogita Gada i/by Harakchand & Co. for plaintiff
None for defendant.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 6th June 2005

PC :

1. This Summons for Judgement was placed before me in the morning session. The name of M/s.A.V.Jain & Associates is shown on the board as Advocate appearing for defendant. An affidavit-in-reply is filed by the said Advocate on behalf of defendant on 2nd March 2005, however, none appeared on behalf of defendant. I, therefore, kept matter back till afternoon session. I had directed orally the learned advocate for plaintiff to give notice to the advocate appearing for the defendant to remain present before me at 2.45 p.m..

2. A notice was duly given by the plaintiff's advocate to the defendant's advocate on which after acknowledging receipt the learned advocate endorses as under :-

> "Instructions to me are not to appear in the matter."

Despite receipt of the notice and the endorsement as aforesaid, none has appeared for the defendant's advocate. The Vakalatnama has not been withdrawn either.

3. In the aforesaid circumstances I heard the plaintiff's advocate. Learned advocate for the plaintiff invited my attention to the plaint averments and the annexures including the Promissory Note. In her submission the suit satisfies the requirements mandated by Order 37 of CPC inasmuch as it is based on Promissory Note. She submits that earlier the rate of interest was agreed @ 18% p.a. and subsequently it was enhanced to 21% p.a.. The defendant had been duly forwarding cheques towards payment of interest and one cheque of Rs.7,875/- for interest @ 21% p.a. was dishonoured and

proceedings were initiated u/s 138 of Negotiable Instruments Act, 1881 against the defendant. In these proceedings, a fresh cheque was handed over and thereupon the complaint stood disposed off. In her submission, therefore, there is no substance in the pleas raised in the affidavit-in-reply about maintainability of the suit and the non execution of promissory note.

4. With the assistance of the learned advocate for plaintiff I have perused the affidavit filed by the defendant in reply. It is contended that the suit is not maintainable as a summary suit. However, it is also contended that the claim is based on a document which is not sufficiently stamped and is therefore inadmissible in evidence. It is contended that the said transaction is a loan as defined under the Bombay Money Lenders Act and the plaintiff is a money lender. It is contended that the Summons for Judgement is taken out six years after filing of the suit. Several triable issues arise for consideration and therefore, the defendant is entitled to unconditional leave to defend.

5. The affidavit contains only denials. In para no.5 it is contended that the cheque forwarded on

1st April 1996 was in furtherance of business dealings and not as a loan. Thereafter, execution of the promissory note is denied. It is also denied that the interest was paid @ 21% p.a. as agreed. The agreement to pay interest is also denied. Insofar as the cheque for Rs.7,875/- is concerned, the fact of it being handed over is denied. At the same time, it is contended that the alleged claim of the plaintiff towards interest has been settled. it is contended that the entire claim is settled in the Criminal Court and therefore nothing is due and payable.

6. In my view, apart from bare denials, there is nothing by which one could conclude that the promissory note or the cheque is not executed or signed. Further, nothing has been annexed to the affidavit which would assist the Court in concluding that the cheque was not issued by the plaintiff as a loan. It is well settled that the plaintiff is entitled to a judgement straight way if the defence raised is frivolous or vexatious.

7. It is equally well settled that contentions raised in the affidavit-in-reply may not disclose a substantial defence but plausible one which

could be substantiated by the defendant, if opportunity is afforded to him to defend albeit on terms. Applying the tests laid down by the Apex Court in matters of grant of leave to defend, this is a fit case where taking into account the totality of the circumstances, conditional leave is granted to the defendant to defend the suit. Accordingly, following order.

8. ORDER : On the defendant depositing a sum of Rs.1.00 lakh (Rs.One lakh only) within a period of 12 weeks from the date of receipt of copy of this order, leave to defend the suit is granted. On such amount being deposited the Prothonotary & Senior Master of this Court to deposit the same in fixed deposit in a Nationalised Bank for a period of 36 months subject to further directions of this Court. On such deposit the suit shall stand transferred to list of Commercial Causes with usual directions to file written statement, discovery and inspection. Needless to state that if the said amount is not deposited further consequences in law would follow.

9. Summons for Judgement stands disposed off with the aforesaid directions. Plaintiff’s advocate undertakes to forward a copy of this

order to the defendant’s advocate.

(S.C.DHARMADHIKARI, J.)